OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

July 29, 2020

To:

Hon. Andrew T. Gonring
Circuit Court Judge
Washington County Courthouse
P.O. Box 1986
West Bend, WI 53095-1986

Theresa Russell
Clerk of Circuit Court
Washington County Courthouse
P.O. Box 1986
West Bend, WI 53095-1986

Mark Bensen
District Attorney
Washington County
P.O. Box 1986
West Bend, WI 53095-1986

Jay R. Pucek
Assistant State Public Defender
735 N. Water St. Ste. 912
Milwaukee, WI 53202-4105

Michael C. Sanders
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

You are hereby notified that the Court has entered the following opinion and order:

2019AP968-CR State of Wisconsin v. Willie Demond McGee (L.C. #2017CF504)

Before Neubauer, C.J., Gundrum and Davis, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Willie Demond McGee appeals from a judgment of conviction entered following his guilty plea to operating a motor vehicle while intoxicated (OWI) as a fifth offense and resisting an officer. He also appeals from an order denying his postconviction motion for resentencing. McGee contends the court improperly relied on his refusal to submit to an officer's request for a blood

sample after he was arrested for OWI. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] As McGee has not demonstrated that the circuit court actually relied on the refusal at sentencing, we affirm the judgment and the order.

The following facts are taken from the criminal complaint. On October 1, 2017, at about 5:00 a.m., Sheriff's Deputy Anthony Conforti stopped McGee, who was driving above ninety miles per hour on a highway. When Corforti asked McGee for identification, McGee gave him the passenger's driver's license. McGee said he did not have a valid license, because "[i]t's suspended or something." Conforti observed that McGee had "slurred speech and bloodshot, glassy eyes." Conforti had McGee get out of the car. When the officer patted McGee down, he found an empty bottle of vodka in McGee's pocket, but McGee denied having consumed alcohol.

Conforti then sought to perform field sobriety tests. McGee initially agreed to the horizontal gaze nystagmus test, but became uncooperative. Nevertheless, Conforti observed all six clues on the test. McGee would not follow instructions on the walk and turn test, effectively refusing to perform any other field test. McGee submitted to a preliminary breath test, which showed a result of .217.

Conforti arrested McGee for OWI. McGee then refused to get into the squad car, telling Conforti, "Don't fucking touch me." McGee eventually got into the car, and a deputy read him the Informing the Accused form and requested a blood sample. McGee refused.

[1] All references to the Wisconsin Statutes are to the 2017-18 version.

McGee became increasingly uncooperative and aggressive. He yelled that the Sheriff's Department needed to pay for his arrest and threatened to damage the squad car. He began forcefully kicking the squad car door. In response to the deputy's request that he stop, McGee said, "Man, fuck you." McGee continued to kick the squad car's door, damaging it, and only stopping after additional officers arrived and put a taser to McGee's shoulder.

McGee threatened a deputy, saying he would punch "the nigger in the mouth," and "Imma fuck him up." He said, "I'm going to beat your goddamned ass boy." He then continued kicking and damaging the squad car door, requiring the officers to move him to a different squad.

A search of McGee's car after the arrest revealed a loaded semi-automatic handgun under the driver's seat.

McGee was taken to a hospital while the officers obtained a search warrant for a blood draw. McGee continued to resist, yelling that the officers would not get his blood. After multiple officers, seven in total, arrived to assist, and McGee's continued flailing and kicking, his blood was drawn revealing an alcohol concentration of 0.194.

The State charged McGee with six crimes: OWI as a fifth offense; operating a motor vehicle with a prohibited alcohol concentration above 0.02, as a fifth offense; carrying a concealed weapon; possession of a firearm by a felon; criminal damage to property; and resisting an officer.

McGee pled guilty to OWI as a fifth offense with a penalty enhancer for having an alcohol concentration above 0.17 and resisting an officer. As part of the plea agreement, the other charges were dismissed but read in at sentencing. A speeding citation was also dismissed.

The circuit court set forth its sentencing rationale in an extremely thorough and well-considered decision. It explained its general sentencing objectives were punishment, rehabilitation, protection of the public, and "sending a message of deterrence to others that this kind of conduct won't be tolerated in our community." In analyzing those objectives, the court considered the gravity of McGee's offenses, his character, and the need to protect the public.

As regards the gravity of "serious" OWI offenses which put others at risk, the court noted that the legislature has continually strengthened OWI laws and increased penalties, but that "a lot of people los[e] their lives as a result of people drinking and driving."

McGee's offense was particularly serious, because he drove "at speeds close to 100 miles an hour" on "the busiest arterial" in the county, and that he did so "with a blood-alcohol level of .194." McGee had four prior OWI convictions. The "[s]peed, alcohol, on top of prior convictions on the busiest arterial" in the county, makes this "a very, very serious case."

As to McGee's character, McGee was also convicted of resisting an officer. The court then recited McGee's actions after being stopped. McGee would not answer direct questions, gave the deputy his passenger's ID, had an empty vodka bottle in his pocket, and lied about consuming alcohol. McGee did not cooperate with field sobriety tests. While McGee agreed to a PBT, the result was .217, "over 10 times your legal limit and your legal limit since 2011 when you got convicted of your OWI third."

The court further addressed McGee's attitude and demeanor after the stop, noting McGee's swearing and resistance. "[Y]ou refuse a chemical test of your blood although you agreed to do that when you get the driver's license, and as a result, we had to find a judge in the middle of the morning, wake him up, early morning hours to get a search warrant." McGee threatened to damage

the squad car and then did so by forcibly kicking the rear passenger door, refusing to stop, and swearing and threatening the officers. The officers had to move McGee to a different squad car because of the damage he caused, and once he was taken to the hospital, McGee was "totally uncooperative," so "[t]hey have to call in all of these extra officers, and as a result, no one is doing anything in Washington County because seven officers are trying to get you to comply with the law." McGee said "you all ain't getting my blood, ain't going to happen," and was "so combative that officers have got to pick you up out of the wheelchair and put you on the hospital bed at which time you start kicking at the officers."

The court said that "the cherry on the sundae is you have got this gun in the car," which the court assumed was McGee's because he had agreed that the court could consider the dismissed counts. The court noted that McGee had two prior convictions for felon in possession.

The court noted that McGee's "prior criminal record" is what really stood out. McGee was on extended supervision when he committed his crimes in this case, and he had been released from prison less than two months before this offense. McGee had been in prison on two separate cases, one for felon in possession of a firearm and felony bail jumping, and in the other for possession of THC and felony bail jumping.

McGee had been released to extended supervision on those cases in 2016, and thirty days later he was arrested for OWI as a fourth offense. In the fourth offense OWI case, McGee had a blood alcohol level of .215. When he was stopped, he was agitated and uncooperative, and violently kicked the passenger door of the squad car. McGee threatened to and did spit in an officer's face. The court said that, "just like our case, you refused a blood draw. Need to go find a judge to get a warrant."

The court noted that McGee had been sent to prison four times, and that he had been revoked from extended supervision three times. That criminal record was "on top of what I think is an extensive criminal history as well with numerous jail stays." From 1996 through 2012, McGee had been convicted for carrying a concealed weapon, felon in possession of a firearm, absconding twice, being arrested in a stolen car, possession of cocaine, criminal damage to property, a sexual assault allegation, and five other convictions in Illinois. "[A]s substantial as that record is, it is more concerning that you can't even make it more than a couple of months out of prison without putting the public at risk, without threatening the safety of law enforcement officers, and without destroying public property." In this case, McGee was released to extended supervision on August 2, 2017, he violated his rules by being in a bar, he left Milwaukee at 5:00 p.m. to go to Oshkosh, despite having a 9:00 p.m. curfew, and he was arrested at 4:57 a.m.

The court noted that McGee had completed the earned release program in early 2017, with "the most intensive institutionalized AODA treatment you can get," but then drove with a "blood-alcohol level of .194 on October 1st, 2017. The court concluded that the earned release program "did absolutely nothing for you."

Addressing the need to protect the public, although noting that it did not "put a lot of weight" on the COMPAS portion of the presentence investigation report (PSI), the court noted that it had "never seen anything like this," as McGee's COMPAS evaluation indicated that he was "maxed out" for violent recidivism risk, general recidivism risk, criminal involvement, history of noncompliance, history of violence, substance abuse, and socialization failure. McGee's COMPAS evaluation indicated that he is a "high risk," which was obvious from McGee's history.

The court concluded by stating, "nobody that can sit here, Mr. McGee, and say this guy is not a risk to the public." McGee was out on earned release for thirty days when he committed his fourth offense OWI, and for sixty days when he committed his fifth offense OWI. McGee was a "substantial risk to the public." "[A]dditional confinement will at least protect the public because you put them at risk within short periods of time every time you have gotten out of prison."

The court then imposed a sentence of seventy-four months of imprisonment, including thirty-four months of initial confinement for McGee's fifth-offense OWI, consecutive to his reconfinement sentence on his prior fourth-offense OWI, and nine months, concurrent, for resisting an officer. The sentence was consistent with that recommended in the PSI.

McGee moved for postconviction relief challenging his sentence. He claimed the sentencing court relied on an improper sentencing factor when it mentioned his refusal to submit to the warrantless blood draw.[2] He pointed to ***State v. Dalton***, 2018 WI 85, 383 Wis. 2d 147, 914 N.W.2d 120, in which the Wisconsin Supreme Court held that by explicitly increasing a person's sentence for OWI because the person refused an officer's lawful request for a blood sample, a sentencing court impermissibly punishes the person for the refusal.

The circuit court denied McGee's motion. The court acknowledged that it referred to McGee's refusal to submit to an officer's request for a blood sample, but stated that it did not explicitly subject McGee to a more severe criminal penalty because of it. McGee appeals.

[2] McGee also claimed that the sentencing court relied on statements in the PSI that were inaccurate. He has abandoned that claim on appeal.

Review of a sentencing decision is limited to determining whether there was an erroneous exercise of discretion. ***State v. Harris***, 2010 WI 79, ¶30, 326 Wis. 2d 685, 786 N.W.2d 409. We will not set aside the court's discretionary determination if it "applied the proper legal standards to the facts before it, and through a process of reasoning, reached a result which a reasonable judge could reach." ***State v. Grindemann***, 2002 WI App 106, ¶30, 255 Wis. 2d 632, 648 N.W.2d 507.

The sentencing court must consider three primary factors—the gravity of the offense, the character of the offender, and the need to protect the public, ***State v. Harris***, 119 Wis. 2d 612, 623-24, 350 N.W.2d 633 (1984), and may consider a variety of other relevant factors, including the defendant's past record of criminal offenses, history of undesirable behavior patterns, and his or her personality, character and social traits, *see* ***State v. Jones***, 151 Wis. 2d 488, 495-96, 444 N.W.2d 760 (Ct. App. 1989). The weight to be given the factors is within the circuit court's wide discretion. ***State v. Curbello-Rodriguez***, 119 Wis. 2d 414, 434, 351 N.W.2d 758 (Ct. App. 1984).

"Discretion is erroneously exercised when a sentencing court imposes its sentence *based* on or in *actual reliance upon* clearly irrelevant or improper factors." ***Harris***, 326 Wis. 2d 685, ¶30. We have a strong public policy against interfering with the sentencing discretion of the circuit court because that court is best suited to consider the factors and demeanor of the defendant, such that sentences are afforded a presumption of reasonableness. ***Id.*** Accordingly, a defendant claiming that a sentencing court relied on an improper sentencing factor bears the heavy burden of "proving, by clear and convincing evidence, that the sentencing court actually relied on irrelevant or improper factors." ***State v. Alexander***, 2015 WI 6, ¶17, 360 Wis. 2d 292, 858 N.W.2d 662.

To determine whether the sentencing court actually relied on a certain factor, we consider "the circuit court's articulation of its basis for sentencing in the context of the entire sentencing

transcript to determine whether the court gave 'explicit attention' to an improper factor, and whether the improper factor 'formed part of the basis for the sentence.'" ***Id.***, ¶¶25, 27 (citation omitted). In other words, would the circuit court have sentenced the defendant in the same manner without the improper factor. *See* ***id.*** In determining whether a circuit court relied on a factor, a reviewing court may consider the circuit court's explanation of its sentencing in response to a motion challenging the sentencing. *See* ***id.***, ¶34.

McGee has failed to show by clear and convincing evidence that the sentencing court imposed its sentence based on or in actual reliance upon McGee's refusal. *See* ***Dalton***, 383 Wis. 2d 147, ¶¶4, 66-68 (holding that court may not explicitly increase the sentence for OWI because the defendant refused a request for a blood sample).[3]

As is abundantly clear, the circuit court set forth its objectives and then thoroughly discussed each of the required sentencing facts and factors relevant to sentencing McGee in great detail, properly exercising its discretion. Indeed, the court engaged in a textbook example of sentencing and is to be commended.

We disagree that the court's recitation of an accurate factual matter, that McGee refused a blood draw, amounts to reliance on an improper factor. The circuit court's determination that McGee presented a grave risk to the public, was deserving of punishment, and that a message of

[3] In ***Dalton***, the sentencing court said,

> [A]nybody who drives a motor vehicle in Wisconsin impliedly consents to a blood or breath draw after they're arrested. And you were arrested, and you disregarded that, and you will be punished for that today. You don't have the right not to consent. And that's going to result in a higher sentence for you.

State v. Dalton, 2018 WI 85, ¶60, 383 Wis. 2d 147, 914 N.W.2d 120.

deterrence that this type of behavior (drunk driving and resisting an officer) would not be tolerated was squarely based on McGee's lengthy criminal record. That record included his repeated driving while intoxicated, his utter failure in treatment and to follow the rules at every turn, and dozens of examples where he was not merely uncooperative, but actively aggressive, threatening officers, destroying property, topped off by illegally carrying a loaded gun as a convicted felon. The refusal was but an example of McGee's attitude, but was dwarfed by McGee's actual recidivist and grave criminal behavior and failure in rehabilitation, which posed a serious and substantial risk to the public's safety. As the circuit court aptly noted, "[T]here is a huge difference between reciting the facts and relying on those facts as a legitimate sentencing consideration."

When viewed in the context of the entire sentencing transcript and the court's rationale denying McGee's motion for resentencing, the court's remarks simply were but a recitation of the factual history of the case. The circuit court relied on proper factors in imposing sentence—the gravity of McGee's offenses, his record of past criminal convictions, including repeated drunk driving convictions, McGee's undesirable behavior pattern, and his repeated failures to rehabilitate. The court explained its basis for imposing McGee's sentence, both at sentencing and in its order denying McGee's motion for resentencing. There is nothing to indicate that the circuit court's sentence was an erroneous exercise of discretion. McGee has not carried his heavy burden to establish that the court actually relied on an improper factor to increase McGee's sentence when it simply noted the fact that McGee refused.

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals